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In the Supreme Court of the United States

OCTOBER TERM, 1982

M/V BIG SAM, in rem and
ZITO TOWING, INC.

Petitioners

VS

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the FWPCA, 33 USC § 1321 (f)(g)(h), preempt the United States government's right to sue for clean-up costs expended to clean an oil spill in navigable waters of the United States under a maritime tort cause of action.

2. Does the United States have standing to sue for damages caused to a waterway within the United States when the claim is founded on a maritime tort and the damages are for oil spill clean-up costs.

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OPINIONS BELOW

All of the opinions below are contained in the attached appendix to the petition for certiorari. Appendix B is the Fifth Circuit's decision in *United States VS M/V BIG SAM,* 681 F.2d 432, (5th Cir., 1982) the judgment from which review is sought from this court. Appendix C is the Fifth Circuit's denial of rehearing and rehearing en banc, published 693 F.2d 451 (5th Cir., 1982). Appendices D, E, and F are the District Courts' opinions in *United States VS M/V BIG SAM,* published at 454 F.Supp. 1144 (E.D. LA., 1978, 480 F.Supp. 290 (E.D. LA. 1979) and 505 F.Supp. 1029 (E.D. LA. 1981).

JURISDICTION

Jurisdiction in the District Court was founded upon 28 USC § 1331, as the case involved a claim by the United States to recover clean-up expenses under the Federal Water Pollution Control Act, 33 USC § 1251 *et seq.* The United States also asserted claims under the Rivers and Harbors Act of 1899, 33 USC § 407, as well as the General Maritime Law, 28 USC 1333.

The judgment of the Court of Appeals was entered on July 30, 1982, and a petition for rehearing and rehearing en banc was denied on December 13, 1982.

The jurisdiction of this Court is invoked under 28 USC § 1254 (1).

STATUTE INVOLVED

The primary statutory provisions involved in this litigation are 33 USC § 1321 (f) (g) (h), which are set out in the attached appendix to petition as Appendix A, in the form the provisions took at the time of the oil spill in question.

STATEMENT OF THE CASE

This case arose on April 25, 1975 when the M/V BIG SAM collided with a barge. The barge was holed and spilled oil into the Mississippi River. The United States cleaned up the oil spill. The money and authorization for the clean-up came from only one source, the FWPCA, § USC § 1251-1376.

The third party vessel, M/V BIG SAM is owned by

Zito Towing, Inc. Zito bareboat chartered the vessel to TriCapt., Inc. a now defunct company. TriCapt., Inc. was found to be liable for the collision because the helmsman steering the M/V BIG SAM at the time of the collision was not properly licensed. In the collision case, in which the United States was not a party and clean-up not an issue, the M/V BIG SAM was held liable with TriCapt., its charterer, under the Admiralty Doctrine of Ship personification—in rem liability. The crew hired by TriCapt. was incompetent, therefore the M/V BIG SAM was found to be unseaworthy. Unseaworthiness was the cause of the collision, ergo BIG SAM was liable.

At the time of the collision and clean-up, the vessel was worth more than the cost of clean-up. Clean-up was approximately TWO HUNDRED SEVENTY EIGHT THOUSAND AND NO/100 ($278,000.00) DOLLARS and the M/V BIG SAM was worth about FOUR HUNDRED THOUSAND AND NO/100 ($400,000.00) DOLLARS. Under FWPCA limits 33 USC § 1321 (g) in effect at the time ($100.00 per gross ton), the 155 gross ton BIG SAM would have a maximum liability of FIFTEEN THOUSAND FIVE HUNDRED FIFTY AND NO/100 ($15,550.00) DOLLARS.

Because the cost of clean-up exceeded the FWPCA limitations substantially, and because the principal defendant and cause of the spill, TriCapt., Inc. was defunct and without the insurance it claimed it had, the United States sued the M/V BIG SAM and its owner Zito Towing, Inc. for the full amount of the clean-up costs under several theories, including maritime tort.

The district court initially held that the government was not limited to the remedies provided by the FWPCA

and could recover as well under both the General Maritime Law and the Refuse Act, *United States VS M/V BIG SAM,* 454 F.Supp. 1144 (E.D.LA. 1978), See Appendix D. Subsequently, following the submission of additional memorandum by all parties, the district judge vacated the previous ruling and held that the government was limited to those remedies specified under the FWPCA. *United States VS M/V BIG SAM,* 480 F.Supp. 290 (E.D. LA. 1979) See Appendix E. Following this ruling, the parties submitted the case for decision on stipulated facts. The trial court entered judgment in the amount of FIFTEEN THOUSAND FIVE HUNDRED FIFTY AND NO/100 ($15,550.00) DOLLARS, the FWPCA statutory limit in favor of the United States against TriCapt., Inc., the bareboat charterer and operator of the BIG SAM. All the claims were dismissed, and the government's in rem claim was disallowed. *United States VS M/V BIG SAM,* 505 F.Supp. 1029 (E.D. LA. 1981) See Appendix F.

The United States appealed and the United States Court of Appeals for the Fifth Circuit reversed the District Court disallowing the government's claim to recover costs in excess of the statutory limits under maritime tort. *United States VS M/V BIG SAM,* 681 F.2d 432 (5th Cir., 1982). See Appendix B. The Fifth Circuit affirmed the District Court's ruling that the government's claim under the Refuse Act was preempted by the FWPCA.

Petitions for rehearing and rehearing en banc were denied by the Fifth Circuit. *United States VS M/V BIG SAM,* 693 F.2d 451 (5th Cir., 1982). See Appendix C. Circuit Judges Gee, Brown, Rubin and Jolly dissented. Petitioner files its petition for writ of certiorari to review the Fifth Circuit's decision and to resolve the conflicts created by its construction of this important statute.

ARGUMENT

INTRODUCTION:

Each and every day hundreds of vessels traverse the Mississippi River carrying all kinds of cargoes. Some carry wheat, corn and other grains, some carry salt, and other minerals, some carry machinery and manufactured goods and some carry chemicals including petroleum. Each U.S. vessel, whether it be a small pushboat, workboat, large towboat, fleet tug, freighter, tanker or barge carrying or not carrying a cargo must be financially responsible in order to operate on the river. This means each owner or operator of a vessel must have insurance protecting him and the vessel against water pollution. 33 USC § 1321 (p), 46 CFR 542, *Financial Responsibility for Removal of Oil and Hazardous Substances.* This rule applies throughout the United States. In everyday work-a-day terms this means that you can not operate on the Mississippi or any U.S. waterway if you cannot afford to purchase oil pollution insurance.

When the FWPCA, 33 USC § 1251 eq seq. was being considered by Congress, "the oil pollution provisions were extremely difficult to resolve because they affected directly the Merchant Marine, concepts of admiralty law, the *American Insurance Market,* and *Overseas Insurance Market,* the balance of payments, international relations, the *economy, small business,* onshore and offshore oil facilities, research provisions, vessel inspection requirements, requirements that vessels will carry oil spill containment equipment as well as the predominate consideration of the protection of our ecology." 116 *Congressional Record* 9328 March 25, 1970.

The Supreme Court has examined the effect of the FWPCA on several occasions. In *Milwaukee VS Illinois*, 451 US 304, 68 L.Ed.2d 114, 101 S.Ct. 1784, the Court held that no federal common law remedy was available to Illinois to seek abatement of the nuisance caused by interstate water pollution because the field was preempted by the comprehensiveness of the FWPCA. In *Middlesex County Sewerage Authority VS Sea Clammers*, 453 US 1, 69 L.Ed.2d 435, 101 S.Ct. 2615, the Court held that the underlying legal basis of the federal common law of nuisance claims was preempted by the FWPCA and that there was no implied private right of action under the FWPCA despite savings clauses.

The circuit courts have also examined the FWPCA. The U.S. argued before the Second Circuit that the FWPCA in 33 USC § 1321 (h) (2) preserved the government's rights against "any third party whose actions may in any way have caused or contributed" to an oil spill making it anomalous for Congress to preserve non-FWPCA remedies against third parties (maritime tort—vessels) if it (Congress) intended to abolish such remedies against discharging vessels. The U.S. claimed because of the anomaly that maritime tort theories could be used to support a claim for full recovery of clean-up costs—(no limitation), against a discharging vessel despite the provisions of 33 USC § 1321 (f). The Second Circuit rejected this argument in *Matter of Oswego Barge Corporation*, 664 F.2d 327 (2nd Cir., 1981). Relying in part upon this court's decisions in *Middlesex County, supra*, and *Milwaukee VS Illinois, supra*, it held:

> "Once Congress legislates comprehensively on the subject of government remedies for oil spill clean-up costs, the responsibility lies with Congress to spell out expressly what, if any, role

> remains for courts to fashion and apply non-statutory remedies the government is asserting in this case."

In a footnote the Court indicated it would probably rule the same way if presented with a third party vessel case like *The Big Sam,* 664 F.2d 327 (at 341, footnote 19). The Fifth Circuit appeared to agree with this rationale when it decided against the Government in *United States VS Dixie Carriers, Inc.,* 627 F.2d 736 (5th Cir., 1980).

However, by refusing to hear the petition for en banc consideration of *United States VS Big Sam,* the Fifth Circuit by default agreed with the Panel on the *Big Sam* that by reason of 1321 (h) and despite 1321 (g) the government may recover without limit against a third party sole cause vessel. The dissent from the refusal to grant rehearing composed of Judges Brown, Rubin, Gee and Jolly, commented on the refusal:

> "Thus we (the Fifth Circuit) decree, he (M/V BIG SAM, third party vessel) may be crushed, while an equal fault discharger is to be shielded."
>
> "(The) Court has slighted its en banc function by refusing to face and resolve a fundamental conflict in principle between its panels, to adopt the approach of the BIG SAM panel and limit or disapprove the reasoning of *Dixie Carriers,* or to consider the countervailing arguments for a construction of the Act consonant with our prior panel decision in *Dixie Carriers.* ...
>
> "So doing, it passes to an overburdened Supreme Court the task of relieving those within our jurisdiction from burdens of which it is probable

> the Congress meant to discharge them, *preserves a clear conflict in principle in our decisions,* and abdicates what I conceive to be its major function."

Not only does the decision in *United States VS M/V BIG SAM* create a conflict within the circuit and with other circuit courts, it also has a profound effect on shipping and insurance along the Mississippi River. In part, the reasons for liability limits in the FWPCA were to allow for insurability on the part of vessel owners and operators as required by Federal Regulations. 116 *Congressional Record,* 9327, March 25, 1970; 115 *Congressional Record,* 28960 October 7, 1969.

The Fifth Circuit considered its decision's affect on insurance cost and procurement. It said that the Limitation of Liability Act, 46 USC § 183 (a) protected vessel owners from potentially crushing liability and from an uninsurable risk. In so stating it ignored reality and its own decisions. The Fifth Circuit has addressed previously the question of insurance premiums as they apply in connection with the Limitation of Liability Act.

> "Regarding the matter of higher premiums, even if this question had not been implicitly disposed of by *Cushing (Cushing VS Maryland Casualty Company* 198 F.2d 536, 5th Cir., 1952), we would reject the contention to begin with, *since in the vast majority of cases limitation is denied for one reason or another, it may well be questioned how significantly the possibility of limitation figures into the actuarial computation of premiums.* Second, since the maritime industry quite often benefits from a full recovery of losses, the policy underlying the Limitation Act is perfectly compatable with spreading losses through higher

> premiums. For example, the interest of the maritime industry in the present case is best served by permitting Olympic to recover its entire loss from the sinking of its vessel; the better policy would seem to favor slightly higher premiums, if really necessary, in order to avoid instances of severe loss. And finally, we do not think that the Limitation Act was intended to limit the amount of premiums paid by vessel owners on insurance. Therefore, we hold, that the possibility of higher premiums is an insufficient basis for permitting an insurer to limit its liability."

In Louisiana and elsewhere, every insurer will have to react to the potential problem this case causes in connection with direct action statutes and the success of limiting liability in a pollution claim. The fact that a maritime tort claim is now permitted and that the United States may proceed against the insurer directly without benefit of limitation and further that should it have a benefit of limitation, the limitation will probably not be successful creates in the insurer sufficient doubt to cause him to raise his premiums significantly to cover the potentially crushing liability of an oil pollution claim. This problem is exactly what Congress considered in reaching the compromise of the Federal Water Pollution Control Act.

This Court is now presented squarely with an issue it did not have to decide in *Milwaukee VS Illinois, supra*, and *Middlesex County VS Sea Clammers, supra*. Specifically that is the preemptive effect of legislation, the FWPCA, upon maritime law. The Sea Clammers Association alleged a claim under federal common law of public nuisance and a claim of maritime tort. The Third Circuit held both claims to be viable, 616 F.2d 1222. The Supreme Court in a limited grant of certiorari, included as one of its questions,

"Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, is not preempted by" the FWPCA. 449 US 917, 101 S.Ct. 314, 66 L.Ed.2d 145 (1980). The grant of certiorari did not expressly include any question bearing upon the plaintiff's claim of maritime tort.

If this Court finds either that the FWPCA preempts a claim for maritime tort or that the United States is without standing to allege a claim for maritime tort, it will resolve all of the issues presented by 33 USC § 1321 (f) (g) and (h). No maritime tort or preemption of maritime tort means there is no maritime lien outside of a grant given in 33 USC § 1321 (f). There is no recovery for clean-up costs outside of the limits set in the FWPCA unless the spill is willful. The effect on insurance cost and procurement is predictable by the companies based upon the language and experience they have with the FWPCA. The questions left open by the Fifth Circuit in *United States VS M/V BIG SAM:*

> "1. Whether a maritime tort not subject to the limitation of liability because of the owner's knowledge of privity would be inconsistent with the remedy provided by the act for willful conduct or willful negligence and
>
> 2. Whether the maritime tort remedy provides a recovery that is cumulative to or concurrent with the remedy provided by subsection (g)"

are resolved.

THE FWPCA PREEMPTS THE RECOVERY BY THE UNITED STATES UNDER FEDERAL MARITIME TORT LAW FOR THE FULL AMOUNT OF ITS CLEAN-UP COSTS

No court nor commentator has ever cited a pre-FWPCA, pre-Oil Pollution Act of 1924, or pre-Rivers & Harbors Act of 1899 case as authority or illustration for the proposition that the United States is or can be the beneficiary as plaintiff of an award for damages resulting from oil pollution of a navigable waterway. The leading case and one most often cited recognizing the maritime tort of oil pollution is *California VS SS Bournemouth*, 307 F.Supp. 922, (C.D. CA., 1969). However, that case recognized California the state as a plaintiff, not the United States. The FWPCA and the case law developed to date all recognize the right of a state to sue for damages caused by oil pollution.

It is uncontested here, indeed it has long been recognized, that power is vested in the federal government to regulate and control the waters of the United States. *the Daniel Ball* 10 Wall 557. But until Congress acts on the subject, the power of the state over its waterways is plenary. *Wilson VS The Black Bird Creek Marsh Company*, 2 Pet. 245 (1829); *Gilman VS Philadelphia*, 3 Wall 713 (1865); *Escanaba Company VS Chicago*, 107 US 678 (1882); *Cardwell VS American Bridge Company*, 113 U.S. 205 (1884); *Hamilton VS Vicksburg, Shreveport and Pacific Railroad*, 119 US 280 (1886); *Willamette Iron Bridge Company VS Hatch*, 31 L.Ed. 629 (1887).

Until Congress does pass a law, "there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. *No precedent however, exists for the enforcement of any such law...*" *Willamette Iron Bridge Company VS Hatch*, 31 L.Ed. 629, 632 (1887). *Erie Railroad VS Tompking*, 304 US 64 (1938) established again that there is no

federal general common law and "except in matters governed by the federal constitution or by Act of Congress, the laws to be applied in any case is the law of the State." *Erie Railroad VS Tompkins, supra.* The only exception recognized to this rule was made at the time *Erie Railroad VS Tompkins* was handed down. *Hinderlider VS LaPata Company,* 304 US 92, 110, 83 L.Ed. 1202, 1212, 58 S.Ct. 803, held that federal common law exists to resolve a dispute where the interstate nature of a controversy renders inappropriate the law of either state.

Illinois VS City of Milwaukee, 406 US 91, 31 L.Ed.2d 712, 92 S.Ct. 1385, did not change the rule handed down in *Hinderlider VS LaPata Company* or *Erie Railroad VS Tompkins.* The beginning of the opinion recognizes Milwaukee's right to be a party as a political subdivision of the State of Wisconsin. The issue of the case was the pollution of interstate waters with the litigants essentially being opposite states. Obviously neither Wisconsin's law nor Illinois' law would have been appropriate to follow for a decision by the U.S. Supreme Court. The court went on to say what has been stated countless times by the Supreme Court. Congress has the right to act and thereby preempt state law and federal common law.

> "It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." *Illinois VS City of Milwaukee, supra,* at page 725, L.Ed.2d.

Later this court held that the FWPCA did in fact completely preempt the federal common law of nuisance for actions between states or their political subdivisions and for actions by private citizens. *Milwaukee VS Illinois,* 451 US 304, 68 L.Ed.2d 114, 101 S.Ct. 1784, and *Middlesex*

County Sewerage Authority VS Sea Clammers, 453 US 1, 69 L.Ed.2d 435, 101 S.Ct. 2615.

> "The court has now held that the federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of the FWPCA..." *Milwaukee VS Illinois* and *Middlesex County Sewerage Authority VS Sea Clammers, supra.*

The Fifth Circuit now holds in *U.S. VS M/V BIG SAM* that the FWPCA did not preempt federal maritime law in one and only one case where a third party vessel causes an oil spill either jointly or by its sole fault. The conclusion of the court is wrong. The FWPCA does preempt recovery by the United States under federal maritime tort law.

The United States Supreme Court has been as reluctant to fashion maritime tort law as it has been to draw a body of general federal common law.

In 1952 the court declined to make a rule sanctioning contribution between joint tortfeasors in non-collision cases Justice Black said:

> "In the absence of legislation, courts exercising common law jurisdiction have generally held that they can not on their own initiative create an enforceable right of contribution as between join tortfeasors. This judicial attitude has provoked protest on the ground that it is inequitable to compel one tortfeasor to bear the entire burden of a loss which has been caused in part by the negligence of someone else...To some extent courts exercising jurisdiction in maritime affairs have felt freer than common law courts in

> fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.
>
> We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should wait Congressional action." *Halcyon Lines VS Haenn Ship Ceiling and Refitting Corporation,* 342 US 282, 72 S.Ct. 277, 96 L.Ed. 318 (1952).

In 1972 the court upheld *Halcyon* by a per curium decision in *Atlantic Coast Line Railroad VS Erie Lackawnna Railroad,* 406 US 340, 92 S.Ct. 1550, 32 L.Ed.2d 110 (1972). *Halcyon* was of course severely limited by the decision in *Cooper Stevedoring Company VS Fritz Kopke, Inc.,* 417 US 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974).

But the court's reluctance to make law absent Congressional act remains as strong as ever. Justice Rehnquist speaking for the majority in *Milwaukee VS Illinois* discussed this principal by referring to the court's holding in *Mobil Oil Corporation VS Higginbotham,* 436 US 618, 56 L.Ed.2d 581, 98 S.Ct. 2010 (1978):

> "In *Mobil Oil Corporation VS Higginbotham,* the court refused to provide damages for 'loss of society' under the general maritime law when Congress had not provided such damages in The Death On The High Seas Act:
>
> 'We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death On The High Seas Act, announces Congress' considered judgment on such issues as the

> beneficiaries, the limitations, contribution negligence, survival and damages...The act does not address every issue of wrongful-death law,...but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the act becomes meaningless.' At 625, 56 L.Ed.2d 581, 98 S.Ct. 2010.
>
> 'Thus the question was whether the legislative scheme 'spoke directly to a question'—in that case—the question of damages —not whether Congress had affirmatively proscribed the use of federal common law.
>
> Our committment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with common sense and the public weal' when Congress has addressed the problem. *TVA VS Hill*, 57 L.Ed.2d 117, 98 S.Ct. 2279"

The Fifth Circuit in *United States VS M/V BIG SAM* maintains that 1321 (h) (2) preserves the maritime tort remedy for the United States. The dissent to the denial of rehearing en banc addresses this issue by saying:

> "1. Our earlier *Dixie Carriers*' opinion concluded that, since Subsection (f)'s liability limitations apply in cases of simple negligence, the FWPCA preempts the general maritime tort remedy for such negligence. Though that decision concerned the liability of discharges, the decision of the *BIG SAM* panel that subsection (g)—textually and conceptually identical to and interlocking with subsection (f)—does not preempt the general maritime tort remedy for simple negligence of third party causes of discharges conflicts in

principle with *Dixie Carriers* and throws the general Congressional scheme into irrational disarray.

2. By focusing exclusively on the literal language of subsection (h) preserving the government's rights against third party causes, the panel opinion saps the limitation of liability provided them by subsection (g) of vitality and all but reads it out of the statute.

3. The *BIG SAM* panel adopts as to third party causes the approach of the original Senate bill—unlimited recovery for simple negligence—that was squarely rejected by the Congress. Such an adoption of a rejected approach in the teeth of the legislative history conflicts with the strongest settled principles of statutory construction, both in this court and in the Supreme Court. See *EG Gulf Oil Corporation VS Coppe Paving Company*, 419 US 186, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974).

33 USC § 1321 (g) states in part:

"In any case where an owner or operator of a vessel...from which oil...is discharged in violation...of this section proves that such discharge of oil...was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an Act of God, an Act of War, or negligence on the part of the United States government, such third party shall, notwithstanding any other provision of law, be liable to the United States government for the actual costs incurred under Subsection (c) for removal of such oil or substance by the United States government, except *where such third party can prove that such a discharge was caused solely by (a) an Act of God, (b) an Act of War, (c) negligence on the part of the United States*

> *government, or (d) an act or omission of another party without regard to whether such act or omission was or was not negligent or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which causes the discharge of oil...the liability of such third party under this subsection shall not exceed $100.00 per gross ton of such vessel or $14 million, whichever is the lesser....If the United States can show that the discharge of oil...was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.*

Compare this language with that of 33 USC § 1321 (h) (2):

> "The liabilities established by this section shall in no way affect any rights which the United States government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance."

It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. *Middlesex County Sewerage Authority VS Sea Clammers, supra,* and *Transamerica Mortgage Advisors, Inc. VS Lewis,* 444 US 11, (1979), *Touche Ross & Company VS Redington,* 442 US 560 (1979).

33 USC § 1321 (g) very clearly sets forth the remedy of the United States where a third party non-discharging vessel causes an oil spill. Congress spoke directly to the

question presented by this case. The M/V BIG SAM falls squarely within the confines of the language. But by reading the more broad provision of 1321 (h) (2), the Fifth Circuit has torpedoed the limitations provided by the FWPCA, floating its decision on a theory of maritime tort recovery for the United States. In so doing, it has ignored the language of this court and the decisions cited above and has in essence completely read out section 1321 (g) of the FWPCA. No thinking person can state honestly that by following the Fifth Circuit's opinion in *United States VS M/V BIG SAM,* 33 USC § 1321 (g) remains viable.

THE UNITED STATES DOES NOT HAVE STANDING TO ALLEGE A CLAIM TO RECOVER ITS CLEAN-UP COSTS BASED ON A THEORY OF MARITIME TORT

Prior to the FWPCA and other federal legislation, the United States did not try to recover clean-up costs. Prior to the FWPCA the United States did not clean the water. After the FWPCA was passed, the United States began clean-up. Now it would like to clean-up the water and recover its expenses in a manner not prescribed by Congress in the act but rather by maritime tort. So far, only the Fifth Circuit has permitted this and only in this third party non-discharging vessel case.

The actions through which most of the modern law of damages was evolved was the action of trespass, with its late progeny case and *Assumpsit.* The parentage of an action in trespass was devised in 1166 upon a Roman model as a remedy against one who had violently wrestled possession of land from another. Shortly after this action called the "assise of novel disseisin", came into use, the practice arose of giving judgment in such cases, not only for the

restoration of the land, but for damages assessed by the jury for the loss of crops and goods taken from the land by the marauder. This incidental relief of damages, like the other features of the action was a borrowing from the practice found in the Roman proceedings upon which the action was modeled. *Damages*, Charles E. McCormack, 1935; George E. Woodvine, "*The Origins of the Action of Trespass*", 33 Yale Law Journal 1924.

The action of trespass is designed to protect the interests and exclusive possession of the land in its intact physical condition. Therefore, any person in the actual and exclusvie possession of the property may maintain the action although he has no legal title. The element of possession is so important in the action of trespass that an owner who is out of possession can not maintain a trespass action.

The idea of possession and the necessity of being in possession is still in the modern thoery of trespass. The American Law Institute Restatement of Torts Second, 1966, states that a trespass on land subjects the trespasser to liability from physical harm to the possessor of the land at the time of the trespass or to the land or his things.

The law framing the guidelines of general maritime tort arose out of the action of trespass and has its same requirements of possession or ownership and damages. (See Benedict on Admiralty.)

The United States may not bring a general maritime tort action against the M/V BIG SAM. The United States lacks the essential elements of a maritime tort. The United States neither owns nor possesses the Mississippi River.

The United States as a proprietor has the same rights which a citizen has to bring the conventional action for protection of its proprietary rights. In *Koch VS United States*, 11 Howard 229, 13 L.Ed. 675, the Supreme Court held that the United States could, without any statute authorizing a suit, sue in trespass for the taking of timber from its land. In *United States VS San Jacinto Tin Company*, 125 US 273, 8 S.Ct. 850, 31 L.Ed. 747, the Supreme Court held that the United States could sue in equity to set aside a patent of United States land which patent had been obtained by fraud. However, the United States does not own nor possess the Mississippi River. *United States VS Appalachain Electric Company*, 311 US 712; 61 S.Ct. 548 (1940). The Mississippi River is a navigable waterway and the flow of a navigable waterway is not capable of possession or ownership. The government's interest in the navigability of such waterways arises out of the constitutional power of Congress to regulate interstate and foreign commerce. Therefore, the government's interest is a regulatory interest and not a proprietary interest. *United States VS Bethlehem Steel Corporation*, 319 F.2d 512 (9th Cir., 1963).

The State of Louisiana as the owner of the riverbed banks and marine life is the proper party to bring a general maritime tort action against the M/V BIG SAM. Justice Frankfurter, concurring in *Toomer VS Witsell*, 334 US 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948) stated,

> "A state should care for its own in utilizing the bounties of nature within her borders because it has the technical ownership of such bounties or, when ownership is in no one, because the state may for the common good, exercise all the authority that technical ownership ordinarily confers."

It is just this "technical ownership" that the State of Louisiana has in its waters that gives it the legal right to bring suit on behalf of the public in order to serve the common good of its citizens. If the State is deemed to be the trustee of its waters, then as trustee, the State is the one empowered to bring a general maritime tort actiongainst pollutors of those waters to protect the corpus of the trust, i.e. the waters, for the benefits of the trust, i.e. the public.

The State of Louisiana is the proper authority to bring the general maritime tort action. The State has the right to preserve its natural resources because of the existence of a state police power. *Gerteer VS Connecticut*, 161 US 519, 16 S.Ct. 600, 40 L.Ed. 793, (1896).

The federal courts have recognized that because the states have the element of possession or ownership that they are the proper parties to bring a maritime tort action to recover damages caused by an oil spill in navigable waters. *California Department of Fish and Game VS SS Bournemouth*, 307 F.Supp. 922 (C.D. Cal. 1969). The court stated that because California possessed the requirement of ownership and damage, the general maritime law provided relief to that owner for the property tortiously damaged by conversion. The same is true in *State of Maryland Department of Resources VS Amerada Hess Corporation*, 350 F.Supp. 1060 (D.MD. 1972).

The prosecuting of a general maritime tort action by the United States government is an invasion of the sovereignty of the State of Louisiana and in the absence of legislation by Congress, a violation of the 10th Amendment. The Supreme Court specifically prohibited such an infringement in *United States VS Appalachain Electric Power Company, supra*, when it said:

> "Actions taken by the United States in the states which are valid under the commerce power cannot be an invasion of the sovereignty of the state in violation of the 10th Amendment under which non-delegated powers remain with the state."

If it is true as the United States maintains, that it has standing to bring this action in maritime tort, one must wonder why no action was taken by the United States to clean-up rivers prior to the legislation of the FWPCA. One must further question why actions under maritime tort were not brought prior to clean-up authorized by the FWPCA. Congress thought it was necessary in the act to provide for the establishment of a maritime lien on a vessel which might be recovered by an action in rem. Legislative History, Public Law 91-224, U.S. Code Congressional and Administrative News Volume 2, 91st Congress, Second Session, 1970, at page 2702. If the United States had standing to bring a maritime tort prior to the enactment of the FWPCA, creation of a maritime lien and an in rem action would not have been necessary. However, the House in its deliberation did believe that it was necessary. These provisions found their way into Section 1321 (f) when the final act was made.

This court is now presented with the opportunity to settle an issue which will continue to bedevil the court for the next several years. Congress tried to address the question of the ecology and the protection of business enterprise. The Fifth Circuit has muddied the waters. This court must decide whether or not the United States has standing to bring a maritime tort and if so whether or not the FWPCA has preempted the United States claim under a theory of maritime tort.

"Vessel owners and operators who can function without protection and indemnity or other liability insurance are few indeed. While all thinking persons want to minimize pollution by oil and hazardous substances, the imposition of liabilities and peanlties which can not be insured against, will not end the pollution by the few who can operate without insurance; it will simply end water transportation of needed products by the may who must have insurance to remain in business. Before imposing uninsurable liabilities and penalties, the question first examined should be whether the product carried on the water is one which the country can do without. 9 *Houston Law Review* 668 by Nicholas Healy.

Should this court refuse to grant certiorari, it will mean that the decision of the Fifth Circuit will stand. More particularly it will mean that the M/V BIG SAM will be seized and sold to pay the debt to the United States for the cost of clean-up. At the time of the collision which caused this spill the BIG SAM was bareboat chartered to TriCapt., Inc., a now defunct company. The vessel was found unseaworthy because TriCapt., Inc. placed on board a helmsman who was not licensed. The owners of BIG SAM did not select or participate in any way with the decision to place this man on board. Nevertheless, because of the personification of the vessel, the owners of the BIG SAM now face loss of their vessel. Additionally, the owners of the BIG SAM received certificates from TriCapt., Inc. indicating that water pollution insurance had been obtained. In truth and in fact, insurance was not obtained to protect the BIG SAM and its owners from the provisions of the FWPCA. If this court grants certiorari and decides that maritime tort does not apply for whatever reason, the owners of the M/V BIG SAM will not lose their vessel.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been mailed to counsel of record for the involved parties, this 11th day of March, 1983.

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